TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1912.

No. [redacted] 33.

SARAH K. McLEAN, WIDOW OF NATHANIEL H. McLEAN,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1910.

(22,101)

(22,101)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 252.

SARAH K. McLEAN, WIDOW OF NATHANIEL H. McLEAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 13, 1912.

1 In the Court of Claims.

No. 29879.

SARAH K. MCLEAN, Widow of Nathaniel H. McLean, Deceased,
v.
THE UNITED STATES.

I. *Amended Petition.*

[Filed August 14, 1908.]

[Original petition filed November 19, 1906.]

To the Honorable the Court of Claims:

The claimant, Sarah K. McLean, widow of Nathaniel H. McLean, deceased, respectfully represents:

1. That she is the widow of Nathaniel H. McLean, deceased, who entered the United States Army as a cadet at the Military Academy on July 1, 1844, who graduated from said academy and was appointed brevet second lieutenant on July 1, 1848, and who was promoted and served continuously until, while holding the grade of major, on July 23, 1864, he was separated from the service by receipt of notice of the acceptance of his resignation.

On March 3, 1875, said Nathaniel H. McLean was reinstated in the service and placed on the retired list of the Army in the grade of lieutenant-colonel under the provisions of the act of March 3, 1875 (18 Stat. L. 516). He died on June 28, 1884. He was paid while in the service, as a major to and including July 23, 1864, and as a lieutenant-colonel on the retired list from and including March 3, 1875.

2. The act of February 24, 1905 (33 Stat. L. 866), provides the following:

"That the proper accounting officers be, and they are hereby directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant-Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July twenty-third, eighteen hundred and sixty-four, to the date of his reinstatement, March third, eighteen hundred and seventy-five, and that the amount found due by said adjustment is hereby appropriated to be paid out of any money in the Treasury not otherwise appropriated."

Under this act claimant presented a claim to the Auditor for the War Department, who allowed the pay of the officer's rank and the personal subsistence which would have been due and payable to said Nathaniel H. McLean in accordance with the aforesaid act. The Auditor for the War Department disallowed the claim for forage for two horses and for servant hire for two servants actually kept by

deceased, and this disallowance was confirmed by the Comptroller of the Treasury.

3. The act of July 17, 1862 (12 Stat. L. 594), provides that majors shall be entitled to draw forage in kind for two horses and that in case forage in kind can not be furnished by the proper department, officers might commute the same according to existing regulations. The act of April 24, 1816, Sec. 12 (3 Stat. L. 299), fixes the money value of forage at eight (8) dollars per month for each horse when the same should be commuted. The act of July 15, 1870 (16 Stat. L. 320), provided a new pay system for officers of the Army, abolishing commuted forage and all such emoluments, by including same in regular pay proper. At all times between September 24,
2 1864, and July 14, 1870, said Nathaniel H. McLean did keep at his own expense two horses.

Under the act of February 24, 1905, this claimant became entitled to all the pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July 24, 1864, to March 2, 1875, including the emolument of forage as aforesaid, from September 24, 1864, to July 14, 1870, inclusive, as follows:

Total for whole period:

Forage for 2 horses, said period	$1,147 20
Less tax	57 36
Balance due	1,089 84
Deduct for 2 horses two months (July 23-September 23, 1864, had no horses)	32 00
	$1,057 84

4. Under the acts of March 30, 1814, Secs. 9, 10 (3 Stat. L. 114); April 24, 1816, Sec. 12 (3 Stat. L. 299); March 3, 1865 (13 Stat. L. 487), and Army Regulations in force from July 24, 1864, to July 14, 1870, there would have been due and payable to said Nathaniel H. McLean as an emolument in the grade of major, servant hire and allowances for as many servants, not exceeding two, as were actually kept by him at his expense at the rate of the pay, ration and clothing allowance of a private soldier in the Army for each servant so kept.

From July 23, 1864, to September 23, 1864, inclusive, said Nathaniel H. McLean kept in his employ at his expense one servant, and from September 24, 1864, to July 14, 1870, inclusive, at least two servants.

Under the act of February 24, 1905 claimant became entitled to such emoluments of servants' pay and allowances of said Nathaniel H. McLean, that is to say, pay and allowance of one servant from July 23, 1864, to September 23, 1864, and pay and allowances of two servants from September 24, 1864, to July 14, 1870, inclusive, which should be calculated as follows:

Total for whole period:		
Pay and allowances for 2 servants, said period	$4,770 50	
Less tax	238 52	
Balance due		$4,531 98
Deduct for one servant two months (July 23-September 23, 1864, had but one servant)		47 00
		$4,484 98

5. The act of July 5, 1838, in force from July 24, 1864, to July 14, 1870, provided (5 Stat. L. 258):

"SEC. 15. And be it further enacted, That every commissioned officer of the line or staff exclusive of general officers shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the Army of the United States."

The commuted value of the ration was fixed from time to time by statute as follows:

Act of February 21, 1857 (11 Stat. L. 163), at thirty cents per ration.

Act of March 3, 1865 (13 Stat. L. 497), at fifty cents per ration.

Act of July 28, 1866 (14 Stat L. 337) provided that the price of the ration should be continued at fifty cents until July 28, 1867, when it became thirty cents.

In determining the length of service in the Army for which said Nathaniel H. McLean should be given credit in computing
3 longevity rations, the Auditor excluded from consideration said Nathaniel H. McLean's service at the Military Academy.

Thus, under the act of February 24, 1905, claimant was paid the longevity rations due an officer of fifteen years' prior service in the Army, from and including July 24, 1864, to June 30, 1868, and the longevity rations due an officer of twenty years' prior service in the Army from July 1, 1868, to July 14, 1870.

Claimant claims that the service of her husband at the Military Academy should have been counted in determining the total length of service for which he should be given credit in computing the amount due. She claims the commuted value of the longevity rations of an officer of twenty years' prior service in the Army from July 24, 1864, to July 1, 1869, and of the rations of an officer of twenty-five years' prior service in the Army from July 1, 1869, to July 14, 1870, less what has already been received.

The amount due is as follows:

Additional ration for 20 years' service:		
July 24, 1864, to February 28, 1865, 217 days at 30¢	$65 10	
Less 5% tax	3 26	
		$61 84
March 1, 1865, to July 27, 1867, 877 days at 50¢	438 50	
Less 5% tax	21 93	
		416 57

July 28, 1867, to June 30, 1868, 338 days at 30¢.	101 40	
Less 5% tax	5 07	
		96 33
Additional ration for 25 years' service:		
July 1, 1869, to July 14, 1870, 379 days at 30¢..	113 70	
Less 5% tax	5 69	
		108 01
Due claimant		$682 75

6. Claimant claims,

Under paragraph 3 hereof	$1,057 84
" " 4 "	4,484 98
" " 5 "	682 76
In all	$6,225 57

No assignment or transfer of this claim, or any part thereof or interest therein, has been made; and the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States. And the claimant claims six thousand two hundred and twenty-five dollars and fifty-seven cents ($6,225.57).

GEORGE A. & WILLIAM B. KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

George A. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

GEORGE A. KING.

Subscribed and sworn to before me this 14th day of August, 1908.
[SEAL.] MARIE A. SEARLES,
Notary Public.

4 II. *Traverse.*

(Filed December 9, 1909.)

In the Court of Claims of the United States.

Term, A. D. 1909-1910.

No. 29,879.

SARAH K. MCLEAN, Widow of Nathaniel H. McLean, Deceased,
v.
THE UNITED STATES.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies

each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

5 III. *Argument and Submission.*

This case was argued on the 7th day of December, 1909, by Mr. Archibald King and Mr. George A. King for the claimant, and by Mr. William W. Scott for the defendants, and submitted.

6 IV. *Findings of Fact, Conclusion of Law, and Opinion of Court.*

(Filed January 17, 1910.)

No. 29,879.

SARAH K. MCLEAN, Widow of Nathaniel H. McLean, Deceased,
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Nathaniel H. McLean, whose widow is the claimant, was, prior to the 23d day of July, 1864, a major and assistant adjutant-general in the United States Army. On that date he was separated from the service by receipt of notice of the acceptance of his resignation.

II.

In accordance with the act of March 3, 1875 (18 Stats., 515), he was reinstated and placed on the retired list as lieutenant-colonel and assistant adjutant-general, to rank from March 3, 1875. He continued in that rank until his death, June 28, 1884.

III.

From the date of the acceptance of his resignation, July 23, 1864, until September 23, 1864, said Nathaniel H. McLean had one servant in his employ on the trip from Portland, Oreg., the place of his resignation, to his home in Cincinnati, Ohio. The time taken to make said trip was about two months. From about September 23, 1864, to July 14, 1870, inclusive, he had servants in his private employ, but how many is not satisfactorily established from the evidence. Said servants were not enlisted men of or connected with the Army of the United States.

IV.

From about September 23, 1864, to about July 14, 1870, said Nathaniel H. McLean owned two horses; one of them was used for a saddle horse occasionally, but they were generally used with the private carriage of the said Nathaniel H. McLean, for his use and that of his family.

V.

Nathaniel H. McLean was not paid forage or servants' pay or allowances for the period from July 23, 1864, to July 14, 1870.

VI.

Claimant entered the Military Academy July 1, 1844, and graduated therefrom and was appointed brevet second lieutenant in the army July 1, 1848.

Under the act of February 24, 1905 (33 Stats., 806), claimant was paid "pay proper and personal subsistence which would have been due and payable to a major and assistant adjutant-general of the army of fifteen years' prior service, from and including July 24, 1864, to June 30, 1868, and the pay proper and personal subsistence that would have been due and payable to a major and assistant adjutant-general in the army of twenty years' prior service from July 1, 1868, to July 14, 1870."

7 If claimant is entitled to be paid pay proper and personal subsistence of a major and assistant adjutant-general of twenty years' service from July 24, 1864, and of a major and assistant adjutant-general of twenty-five years' service from July 1, 1869, there is due claimant, in addition to what he has already been paid:

Additional ration for 20 years' service:		
July 24, 1864, to February 28, 1865, 217 days, at 30 cents	$65.10	
Less 5 per cent tax	3.26	
		$61.84
March 1, 1865, to July 27, 1867, 887 days, at 50 cents	438.50	
Less 5 per cent tax	21.93	
		416.57
July 28, 1867, to June 30, 1868, 338 days, at 30 cents	101.40	
Less 5 per cent tax	5.07	
		96.33
Additional ration for 25 years' service:		
July 1, 1869, to July 14, 1870, 379 days, at 30 cents	113.70	
Less 5 per cent tax	5.69	
		108.01
Due claimant		682.75

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that plaintiff is not entitled to recover on the items for servants and forage, and as to these two items the petition is dismissed. On the item for $682.75 on account of additional ration, judgment will be entered for plaintiff for the sum stated.

Opinion.

HOWRY, *J.*, delivered the opinion of the court:

Plaintiff is the widow of Nathaniel H. McLean, who sues, in her own right and not in a representative capacity, under a special act of Congress.

Nathaniel H. McLean entered the Military Academy in 1844. He rose through various ranks until, in 1863, he attained the rank of major, and was made assistant adjutant-general in the Regular Army. While so serving he resigned, and his resignation was accepted July 23, 1864. By an act approved March 3, 1875, 18 Stats., 516, Congress authorized the appointment of Major McLean to the first vacancy in the lowest grade in the Adjutant-General's Department, or to reinstate or retire him with the rank he would have attained had he continued in the service. The President reinstated and retired him as lieutenant-colonel, and he continued on the retired list until his death, in 1884. He did not receive any pay from the date his resignation was accepted, July 23, 1864, to the date of his reinstatement, March 3, 1875.

But by an act approved February 24, 1905, 33 Stats., 806, it was provided—

"That the proper accounting officers be, and they are hereby, directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant-Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major, from July twenty-third, eighteen hundred and sixty-four, to the date of his reinstatement, March third, eighteen hundred and seventy-five, and that the amount found due by said adjustment is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated."

Under this act plaintiff presented a claim to the Auditor for the War Department, who allowed the pay of the officer's rank and the personal subsistence which would have been due and payable to the deceased officer in accordance with the aforesaid act. The claim for forage for horses, and for servants' pay and allowances was disallowed, and this disallowance was confirmed by the Comptroller of the Treasury. The payment as made included pay, subsistence, and longevity rations which would have been due the deceased officer during the time he was out of the service.

The questions now presented relate to the right of plaintiff to recover forage for two horses covering the whole period when the officer was out of the army; and, next, for servants' pay and allow-

ances during the same period; and last, for longevity pay, all of which were disallowed under the opinion of the comptroller. The total amount sued for is $6,225.57.

Paramount to the inquiry on the merits is the matter of the power of the court to proceed. Defendants contend that the court can not take jurisdiction, inasmuch as the act under which the claim is made constituted the proper accounting officers of the Treasury a special tribunal to pass upon the matter and to determine the amount found due, and that the adjustment there made became final. This contention is sought to be supported by the following authorities: Kimberlin's case, 104 Fed. Rep., 653; Harvey v. Tyler, 2 Wall., 328; Lumber Co. v. Buchtel, 101 U. S., 638; Steel v. Smelting Co., 106 Ibid., 447; United States v. Cal. & Oregon Land Co., 148 Ibid., 31; Keim v. United States, 33 C. Cls. R., 174; 177 U. S., 290; Plummer's case, 24 C. Cls. R., 517; Day's case, 21 Ibid., 262; Parish v. MacVeagh, 214 U. S., 124.

8 The jurisdictional statute carries a plain and simple direction to the accounting officer to settle and adjust all back pay and emoluments that would have been due and payable to the officer. The amount of this back pay was fixed by law; and likewise the emoluments, though dependent upon contingencies incident to the service, were regulated by statute. When these contingencies were shown to have existed in the performance by the officer of the things necessary to be entitled, within the meaning of the act, the claimant became also entitled to be paid the sums duly ascertained. The duties thus imposed upon the accounting officers were administrative like unto those imposed upon the Secretary of the Interior under the act of June 16, 1880, 21 Stats., 287, where entries of public lands were authorized to be canceled for conflict, or where an entry had been erroneously allowed and could not be confirmed and where it was provided that the Secretary of the Interior should make repayment. In Medburg v. United States, 173 U. S., 492, it was held that where the act which provided for repayment to the person making entry of the fees and commissions, purchase money and excesses paid upon the entry the jurisdiction of the Secretary of the Interior was not exclusive, but that the Court of Claims had jurisdiction wherever the party failed to receive relief from the Secretary.

In Parish v. MacVeagh, supra, it was held that under the act of February 17, 1903, ch. 559, 32 Stats., 1612, the Secretary of the Treasury being directed to determine and ascertain the full amount which should have been paid to Parish if the contract had been carried out in full without change or default by either party and to issue his warrant therefor no judicial duty devolved upon the Secretary; nor did the Secretary have power to determine what was right or proper, but only the administrative duty of ascertaining the amount and paying the same; and, the amount having been ascertained, the claimant was entitled to a writ of mandamus directing the Secretary to issue his warrant.

By the act of March 3, 1887, ch. 359, 24 Stats., 505, the Court of Claims was given jurisdiction to hear and determine, among other things, all claims founded upon any law of Congress. The court had

the same power prior to the act of 1887, and numerous cases have arisen respecting the extent of the general jurisdiction of the court for many years. The decisions do not seem to have been always harmonious. But pay of an officer can be recovered in this court notwithstanding the refusal of the head of the administrative department to recognize the officer in his office. Redgrave v. United States, 20 C. Cls. R., 226; 116 U. S., 474; Perkins v. United States, 20 C. Cls. R., 438; 116 U. S., 483. The rule declared in these cases is the broad principle declared in Medburg v. United States, supra. In the present case there are essentially no disputed questions of fact before the accounting officer; and we are of opinion that the decision must turn upon the proper construction to be given the act granting the relief, and that the court has jurisdiction to determine these questions.

Construing the act of February 24, 1905, supra, the comptroller was of opinion that there could be allowed only such pay and emoluments as would have been due and payable as compensation for services alone, and that nothing could be allowed for such emoluments as were in the nature of reimbursement for expenses incurred and dependent upon conditions other than service as an officer. Because in Sherburne's case (16 C. Cls. R., 491) this court held that "allowances," as they are now called, or "emoluments," as they were formerly termed, are indirect or contingent remuneration which may or may not be earned and which is sometimes in the nature of compensation and sometimes in the nature of reimbursement, learned counsel for claimant urges that the comptroller's contention that the allowances here claimed were reimbursements only, and therefore not within the statute, is destroyed.

The act of April 24, 1816 (3 Stats., 299), declared:

"Provided also, That none except company officers shall be allowed to take as servants or waiters soldiers of the army, and that all officers be allowed, for each private servant actually kept in service not exceeding the number authorized by existing regulations, the pay, rations, and clothing of a private soldier, or money in lieu thereof, on a certificate setting forth the name and description of the servant or servants in the pay account."

The act of March 3, 1865 (13 Stats., 487), provided:

"That the measure of allowance for pay for an officer's servant is the pay of a private soldier as fixed by law at the time; that no noncommissioned officer shall be detailed or employed to act as a servant, nor shall any private soldier be so detailed or employed except with his own consent; that for each soldier employed as a servant by any officer there shall be deducted from the monthly pay of such officer the full monthly pay and allowances of the soldier so employed; and that, including any soldier or soldiers so employed, no officer shall be allowed for any greater number of servants than is now provided by law, nor be allowed for any servant not actually and in fact in his employ."

9 The act of July 17, 1862 (12 Stats., 594), declared:

"That officers of the army entitled to forage for horses shall not be allowed to commute it, but may draw forage in kind for

each horse actually kept by them when at the place where they are on duty, not exceeding the number authorized by law: Provided, however, That when forage in kind can not be furnished by the proper department, then, and in all such cases, officers entitled to forage may commute the same according to existing regulations: * * *

"And be it further enacted, That major-generals shall be entitled to draw forage in kind for five horses; * * * and majors, for two horses."

The act of April 24, 1816 (3 Stats., 299), fixed the allowance for forage at $8 per month for each horse.

Paragraph 1123, Revised Army Regulations, edition of 1863, directed that—

"Forage shall be issued to officers only in the months when due, and at their proper stations, and for horses actually kept by them in service."

The act of June 20, 1864 (chap. 145, sec. 11), provided:

"That the thirty-first section of an act entitled 'An act for the enrolling and calling out the national forces, and for other purposes,' approved March 3, 1863, be, and the same is hereby, so amended as that an officer may have, when allowed by order of his proper commander, leave of absence for other causes than sickness or wounds, without deduction from his pay or allowances: Provided, That the aggregate of such absences shall not exceed thirty days in any one year."

General Orders, No. 5, issued January 26, 1872, by the War Department, provided that—

"Officers of the army entitled to forage for horses may draw forage for horses in kind for each horse actually kept by them when, and at the place where, they are on duty, not exceeding the number authorized by law, but under no circumstances will this forage allowance be commuted or the money value thereof paid to the officer, his agent, or any other person."

The pay, rations, and clothing for servants relate to each private servant actually kept in service by the officer; and the forage provided for horses relates to animals actually kept by officers when and at the place such officers are on duty. These statutes carry pay rations, and clothing in the one case and forage in the other for the public service of the officer when on actual duty. Both items were intended to reimburse the officer for supposed expenditures regardless of salary. Thus, travel fees are designed as a reimbursement or communication for mileage, irrespective of the amount of "compensation" for services of a district attorney under statutes which provide for both. United States v. Smith, 158 U. S., 346. Reimbursement is primarily what the law contemplates. Odell v. United States, 38 C. Cls. 194.

As an officer of his grade plaintiff's intestate was entitled to two servants and to forage for two horses had he remained in the military service. But the officer resigned and such voluntary retirement from the service operated to deprive the officer by his own act of the opportunity to draw the allowances incident to the keep of two serv-

ants and two horses. The act providing back pay and emoluments was not designed to give life to a claim for the hire of servants and the use of horses by this officer in his private capacity as an individual. The contention that the statute was intended for such purpose must be rejected because it was not contemplated that the officer taking himself out of the service could thus acquire such an advantage over those who remained in the service. Had the officer continued his connection with the army he would not have been entitled to reimbursement for expenses which were never incurred, as, for example, had he been absent on sick leave or furlough either for his convenience or pleasure. As to the two first items stated the petition is dismissed.

The claim for the additional ration for the time set forth in the sixth finding is analogous to longevity pay and is on a different basis. Such pay results from so many years of service, and the compensation therefor becomes a part of the dues of the Government to an officer who rounds out the lustrum periods. The act reinstating McLean as a lieutenant-colonel and retiring him in that rank carried the pay of the rank just as if he had actually served, together with the longevity increase. The two sums added carry out the statutory measure of compensation for this case. That is, the officer by the act of reinstatement became entitled to compensation for and during the whole period of service, with the consequent ration increase incident to the services supposed to have been rendered for the time set forth in the petition. It all is, strictly speaking, "pay proper." Irwin v. United States, 38 C. Cls. R., 87; Mills v. United States, 40 C. Cls. R., 530; Ibid., 197 U. S., 223. This entitles the plaintiff to $682.75 in addition to the amount allowed by the accounting officers. Judgment will be entered for that amount.

10 V. *Judgment of the Court.*

No. 29879.

SARAH K. MCLEAN, Widow of Nathaniel H. McLean, Deceased,
v.
THE UNITED STATES.

At a Court of Claims, held in the city of Washington on the 17th day of January, 1910, judgment was ordered to be entered as follows:

"The Court, on due consideration of the premises, find in favor of the claimant and do order, adjudge and decree that the claimant, Sarah K. McLean, widow of Nathaniel H. McLean, deceased, do have and recover of and from the United States, the sum of six hundred and eighty-two dollars and seventy-five cents ($682.75)."

By THE COURT.

11 VI. *Application for Appeal.*

In the Court of Claims.

No. 29879.

SARAH K. MCLEAN, Widow of Nathaniel H. McLean, Deceased,
v.
THE UNITED STATES.

From the judgment rendered in this cause on the 17th day of January, 1910, the claimant, Sarah K. McLean, widow of Nathaniel H. McLean, deceased, by her attorneys of record, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed in open Court April 4, 1910.

Whereupon it was ordered that the appeal be allowed as prayed for.

By THE COURT.

12 In the Court of Claims.

SARAH K. MCLEAN, Widow of Nathaniel H. McLean, Deceased,
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact, and conclusion of law—and opinion filed by the Court, of the judgment of the Court, of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and the Seal of the Court of Claims this 12th day of April 1910.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 22,101. Court of Claims. Term No. 252. Sarah K. McLean, widow of Nathaniel H. McLean, deceased, appellant, vs. The United States. Filed April 13th, 1910. File No. 22,101.

Supreme Court of the United States.

October Term, 1911.

SARAH K. McLEAN, widow of NATHANIEL H. McLEAN, *Appellant*,
v.
THE UNITED STATES.
} No. 252.

BRIEF FOR APPELLANT.

Statement.

This is an appeal from the Court of Claims. The point involved is whether the appellant, the widow of an army officer, is entitled under a special act for her relief, hereinafter set out (p. 3), to the allowances of forage and servants' pay. For a thorough understanding of this case it is necessary to consider the circumstances leading up to the passage of the special act referred to.

Nathaniel H. McLean, whose widow is the appellant, entered the Military Academy in 1844, and rose through various ranks until, in 1863, he was major and assistant adjutant-general in the Regular Army. While serving in that year as adjutant-general of the department of the Ohio, he discovered gross irregularities and frauds in the conduct of an assistant quartermaster of volunteers, on duty in that department. A court-martial was ordered to try this quartermaster, but owing to political pressure and false suspicions of Major McLean's loyalty raised by this quartermaster and his associates, the court was dissolved

just as the trial was about to commence. At the same time, Major McLean, who would have been an important witness for the prosecution at the trial, was, against the protest of Major-General Burnside, commanding the department of the Ohio, ordered to duty in the military district of Oregon.

Major McLean sailed from New York on Christmas Day, 1863, for Oregon, by way of Panama. He remained on duty in Oregon for several months. But considering such an order, given under such circumstances, a virtual banishment in disgrace, and finding no way to vindicate himself while in the Army, he resigned. He received notice of the acceptance of his resignation July 23, 1864.

These facts are more fully stated in House Report No. 279, 43d Congress, 2d Session, a reprint of which is appended to Senate Report No. 126, 53d Congress, 2d Session. They are here repeated, not as having a direct bearing on the issues of law involved, but to show that Major McLean's resignation was not a desertion of the service in time of war, but was forced upon him by the treatment he had received. That Congress so regarded it is shown by its subsequent action.

By act of March 3, 1875, c. 187, 18 Stat. L. 515, Congress authorized the President to appoint Major McLean to the first vacancy in the lowest grade of the Adjutant-General's Department, or to reinstate and retire him with the rank which he would have attained had he continued in the service. The President did the latter, and accordingly Major McLean became a lieutenant-colonel on the retired list, which rank he held until his death in 1884. He did not, however, receive any pay from the date his resignation was accepted, July 23, 1864, to the date of his reinstatement, March 3, 1875.

Congress still further recognized the wrong done to

Lieutenant-Colonel McLean by the enactment of the following as a part of the act approved February 24, 1905, c. 777, 33 Stat. L. 743, 806, entitled, "An Act for the allowance of certain claims reported by the Court of Claims, and for other purposes":

"That the proper accounting officers be, and they are hereby directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant-Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July twenty-third, eighteen hundred and sixty-four, to the date of his reinstatement, March third, eighteen hundred and seventy-five, and that the amount found due by said adjustment is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated."

The Auditor for the War Department made a computation of what he considered due appellant under this act which he referred to the Comptroller of the Treasury for approval in accordance with section 8 of the Dockery act of July 31, 1894, c. 174, 28 Stat. L. 208. The Comptroller decided that appellant was entitled to the pay, longevity pay and personal subsistence or commutation of rations due a major for the period mentioned in the act, but was not entitled to forage or to servants' pay, clothing and subsistence. Settlement was then made by the Auditor upon the basis directed by the Comptroller.

Appellant thereupon brought suit in the Court of Claims, claiming (1) forage, (2) servants' pay, clothing and subsistence, and (3) a balance of longevity pay due her because the Comptroller had refused to give her credit for her husband's service as a cadet at the Military Academy, as required by the decision of this court in *United States* v. *Watson*, 130 U. S. 80. (See amended petition, record, p. 1). She showed that her husband actually had horses

and servants in his employ during the time in question. The Court of Claims gave judgment for the third item only. (See conclusion of law and opinion, record, p. 7; judgment, record, p. 11.)

Assignment of Error.

Appellant hereby assigns the following errors in the judgment of the Court of Claims:

I. Said court held and decided that appellant was not entitled to the commuted value of forage which would have been due and payable to Nathaniel H. McLean as a major from September 24, 1864, to July 14, 1870.

II. Said court held and decided that appellant was not entitled to servants' pay, rations, and clothing which would have been due and payable to the said Nathaniel H. McLean as a major from July 24, 1864, to July 14, 1870.

BRIEF OF ARGUMENT.

Statutes Granting Forage and Servants' Pay and Allowances.

During the period from 1864 to 1870, the right of officers of the Army to forage was governed by the following statute, Act of July 17, 1862, c. 200, 12 Stat. L. 594:

"That officers of the Army entitled to forage for horses shall not be allowed to commute it, but may draw forage in kind for each horse actually kept by them when and at the place where they are on duty, not exceeding the number authorized by law: Provided, however, That when forage in kind can not be furnished by the proper department, then, and in all such cases, officers entitled to forage may commute the same according to existing regulations: * * *

"*And be it further enacted*, That major-generals shall be entitled to draw forage in kind for five horses; * * * and majors, for two horses."

The Act of April 24, 1816, c. 69, 3 Stat. L. 299, fixed the commutation for forage at $8 per month for each horse.

During the period involved in this case, the right to servants' pay and allowances was governed by the following statutes:

Act of April 24, 1816, c. 69, 3 Stat. L. 299:

"*Provided, also,* That none, except company officers shall be allowed to take as servants or waiters, soldiers of the Army, and that all officers be allowed, for each private servant actually kept in service, not exceeding the number authorized by existing regulations, the pay, rations and clothing of a private soldier, or money in lieu thereof, on a certificate setting forth the name and description of the servant or servants, in the pay account."

Act of March 3, 1865, c. 79, 13 Stat. L. 487:

"That the measure of allowance for pay for an officer's servant is the pay of a private soldier as fixed by law at the time; that no non-commissioned officer shall be detailed or employed to act as a servant, nor shall any private soldier be so detailed or employed except with his own consent; that for each soldier employed as a servant by any officer there shall be deducted from the monthly pay of such officer the full monthly pay and allowances of the soldier so employed; and that, including any soldier or soldiers so employed, no officer shall be allowed for any greater number of servants than is now provided by law, nor be allowed for any servant not actually and in fact in his employ."

Army Regulations, edition of 1863, p. 358, fixes at two the number of servants allowed an assistant adjutant-general with the rank of major.

The act of July 15, 1870, c. 294, §24, 16 Stat. L. 320, abolished all these minor allowances and substituted an annual salary therefor, so the question at issue can not arise for any period after that date.

The Intent of Congress.

As has been said, the sole question at issue in the present case is whether under the Act of February 24, 1905, forage and servants' pay and allowances are due.

In every question of statutory construction, the first inquiry is, what was the intent of the legislature?

By authorizing Lieutenant-Colonel McLean's reinstatement in the Army in 1875 Congress showed its belief that he had been unfairly treated, and tried to right the wrong that had been done him.

The act of 1905 went still further in this direction and sought to make amends to the fullest extent possible for the harsh treatment to which he had been subjected. It sought to place his widow in the same position pecuniarily as if he had been a major during the period in question. The statute is remedial in character and should be liberally construed.

In *Collins* v. *United States*, 14 C. Cls. 568, 15 C. Cls. 22, the Court of Claims considered and construed a statute quite similar in terms.

In *Kilburn* v. *United States*, 15 C. Cls. 41, it was said (p. 46):

"In all the cases referred to, the parties to whom back pay has been allowed have been considered by Congress to have been illegally or unjustly or inadvertently dismissed the service. In order to remedy the wrong or repair the injustice of such dismissal, it has been considered both just and humane that its revocation should be complete, and should relate back to the day of the order of dismissal, so as to make the party entitled to full pay, as though no such order had ever been made."

If Lieutenant-Colonel McLean had been a major during that time, he would have required horses and servants, and would have received this allowance. He actually had the horses and servants and to carry out

Congress's intention to put his widow in the same pecuniary position, she should get these allowances too.

The *Jones* Case in Point.

The case most directly in point is *Jones* v. *United States*, 4 C. Cls. 197, in which the claimant, a volunteer officer in the civil war, had been captured and while in a Confederate prison had been dismissed from the service. There was in force at the time the following statute, act of March 30, 1814, c. 37, section 14, 3 Stat. L. 115:

"Sec. 14. *And be it further enacted*, That every non-commissioned officer and private of the army, or officer, non-commissioned officer, and private of any militia or volunteer corps, in the service of the United States, who has been or who may be captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled whilst in the actual service of the United States."

That claimant, like Lieutenant-Colonel McLean, was not actually in the service, but under a statute was to be paid as though he had been. The Court of Claims, speaking through Judge Nott, who sat on its bench for over forty years, was of opinion that servants' pay was due if the claimant actually had a servant in his employment at his home, even though he was languishing in captivity. The decision, rendered shortly after the Civil War, at a time when this complicated system of pay was still in force and familiar to all, is directly in point and should be followed.

"Emoluments" a Most Comprehensive Term.

That Congress intended to place claimant in every respect in the same position as if her husband had remained in the service, and to give her everything which he would

have received is shown by the words used in the statute. Congress says "all back pay and emoluments." It would be hard to find a more comprehensive term than "emoluments."

In the sundry civil appropriation act of 1902 there was a legislative definition of this word. The act said:

"For fees of clerks, two hundred and forty thousand dollars: *Provided*, That each clerk of the district and circuit courts shall, on the first days of January and July of each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, written returns for the half year ending on said days, respectively, of all fees and emoluments of his office of every name and character, and of all necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year; and the word 'emoluments' shall be understood as including all amounts received in connection with the admission of attorneys to practice in the court, all amounts received for services in naturalization proceedings, whether rendered as clerk, as commissioner, or in any other capacity, and all other amounts received for services in any way connected with the clerk's office." (Act of June 28, 1902, c. 1301, 32 Stat. L. 475, 476.)

In *Apple* v. *Crawford County*, 105 Pa. St. 300, the court adopted the definition of that word found in Webster's Unabridged Dictionary, "the profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites; advantage; gain, public or private."

That "emoluments" is broad enough to include forage and servants' allowances appears not only from the definition just quoted, but from the facts of the case referred to, *Apple* v. *Crawford County*. There the State constitution forbade any reduction in the emoluments of an

officer during his term. It was held that a fixed *per capita* allowance paid the sheriff for boarding prisoners was an emolument and might not be reduced. So also in *Regina* v. *Postmaster-General*, 3 Queen's Bench Division, 428, it was held that a fixed *per diem* allowance for travelling expenses must be taken into account when estimating total emoluments.

So, too, in *Hoyt* v. *United States*, 10 Howard, 109, 135, it is said in regard to the terms "fees and commissions":

"They are also distinguishable from the term emoluments, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office; and such is the obvious import of it in these acts."

In view of the evident liberal intention of Congress in passing this remedial statute and the broad scope of the word "emoluments," what reasons may be assigned for withholding these allowances?

The Contingency Has Happened.

One of the reasons urged against this claim is that these allowances were contingent or conditional. That they were so may be admitted. Said the Court of Claims in *Sherburne* v. *United States*, 16 C. Cls. 491, 496:

"Allowances, as they are now called, or emoluments as they were formerly termed, are indirect or contingent remuneration, which may or may not be earned, and which is sometimes in the nature of compensation, and sometimes in the nature of reimbursement."

But the point we desire to impress is that here the contingency has happened. Lieutenant-Colonel McLean actually had these horses and servants. Ordinarily, to entitle any person to forage and servants' pay during the

period in question it would have been necessary for that person to show (1) that he was an officer of the Army and (2) that he had the horses and servants. But the statute expressly relieves appellant from the first requirement, and the second was satisfied by the facts. The act says that appellant shall receive "all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major," during the period in question. As he actually had these horses and servants, he would, if he had been a major, have received these allowances. This being so, his widow should receive them now.

It is no answer to say that the horses and servants he actually had were not used to assist him in performing military duty. Congress has shown by its action that it desired his widow to receive what he would have received had he been in the Army. As to the servants, the case is especially clear. It was never contemplated that the servants for whom an officer receives pay and allowances should assist him solely in military duties. There is nothing in the statute or regulations requiring this. Indeed, the contrary clearly appears when the statute says "servants or waiters" (*ante*, p. 5). A waiter does not assist an officer in his military duties.

Furthermore, in *Jones* v. *United States*, 4 C. Cls. 197, discussed *ante*, p. 7, the Court of Claims held that to entitle the officer to servants' pay, the servant need not be in the same place as the officer. In that case the officer was in an enemy's prison, but the court was of opinion that he might recover servants' pay if he had a servant in his employ at his home. Under such circumstances the servant could not assist the officer in the discharge of his military duties; and the case is a direct authority that that is not necessary.

These Allowances More Than Reimbursement.

Another ground assigned for rejecting this claim is that these items were in the nature of reimbursement for expenses incurred.

But this is not correct. The allowances are fixed, irrespective of the amounts actually expended by the officer for keep of his horses and pay, clothing, and subsistence of his servants. From 1865 to 1867, $37.50 per month was allowed for each servant. It would surely have been possible to keep a servant for less than that. Hence, a considerable part of this allowance was clear gain and by no means merely reimbursement.

The same is true in regard to mileage of an officer in the Navy. Where the law allows an officer mileage and the Government, instead of paying him that mileage, reimburses him for the full amount of his traveling expenses, he may, nevertheless, come into the Court of Claims and recover the full amount of his statutory mileage. *United States* v. *Temple*, 105 U. S. 97; *Thomas* v. *United States*, 38 C. Cls. 70.

The same is true as regards the travel allowance of a soldier on discharge. Even if the Government carries the soldier on a transport, yet if the law allows him his travel pay he may come into court and claim it afterwards, thus making a clear profit out of the journey. *Reichherzer* v. *United States*, 43 C. Cls. 359.

Payable Even if Merely Reimbursement.

But even supposing that these allowances are merely reimbursement, what reason is that why they should not be paid? The purpose of Congress as shown by the term "emoluments" used by it is broad enough to cover reimbursements. In *Apple* v. *Crawford County*, *supra*, an allowance to the sheriff for boarding prisoners; and in *Regina* v. *Postmaster-General*, *supra*, traveling expenses

were held to be "emolument"; yet they are no more and no less reimbursements than this.

The artificial nature of the distinction drawn by the Comptroller and sustained by the Court of Claims is shown by the fact that the officer's own commuted rations were allowed, but those of his servant denied. The one is as much reimbursement as the other.

Recapitulation of Argument.

Forage and servants' pay, clothing and subsistence are due, because:

1. The intent of Congress was to place claimant in the same position pecuniarily as though Lieutenant-Colonel McLean had been in the Army during this period.

2. To carry out this intent, it used a most comprehensive term, "emoluments."

3. If it be said that these allowances are contingent, the contingency has happened, for Lieutenant-Colonel McLean had horses and servants.

4. These allowances are more than mere reimbursement, but even if that is all they are, they are none the less recoverable.

The Amount Due Appellant.

Although expressly requested by appellant so to do, the Court of Claims failed to find the amount due her if she should be held entitled to forage. The computation is, however, a mere matter of arithmetic, and is made in the amended petition (record, p. 2). That calculation is copied from one made by the Auditor for the War Department and transmitted by him to the Court of Claims.

With respect to the item of servants' pay the Court of Claims made the following finding (record, p. 5):

"From the date of the acceptance of his resignation,

July 23, 1864, until September 23, 1864, said Nathaniel H. McLean had one servant in his employ on the trip from Portland, Oreg., the place of his resignation, to his home in Cincinnati, Ohio. The time taken to make said trip was about two months. From about September 23, 1864, to July 14, 1870, inclusive, he had servants in his private employ, but how many is not satisfactorily established from the evidence. Said servants were not enlisted men of or connected with the army of the United States."

While it is true this finding does not state how many servants Lieutenant-Colonel McLean had in his employ, it uses the plural number, which shows that he had at least two. As appellant can not recover pay for any more servants than were allowed by Army Regulations (act of 1816, quoted *ante*, p. 5), and as they authorized but two servants for a major (Army Regulations, edition of 1863, p. 358), it makes no difference whether or not Lieutenant-Colonel McLean had more than two. The allowance must, therefore, be computed on the basis of one servant from July 23 to September 23, 1864, and two from that date to July 14, 1870. Appellant asked the Court of Claims to find the amount due her upon this basis, but it failed to do so. This amount is, however, shown by a computation in the amended petition (record, p. 3), which is a copy of a computation made by the Auditor for the War Department and transmitted to the Court of Claims. We presume its accuracy will not be questioned by appellees.

The amount due appellant is therefore as shown by the calculations in the amended petition (record, pp. 2, 3):

Forage	$1,057 84
Servants' pay and allowances	4,484 98
Longevity rations (for which judgment has already been rendered)	682 75
Total	$6,225 57

The court is therefore asked to remand the case to the Court of Claims with directions to enter judgment in favor of appellant for $6,225.57. If in the court's opinion the amount due appellant is not shown with sufficient definiteness by the record, the court is asked to remand the case to the Court of Claims with directions to ascertain the amount due appellant for forage and servants' pay and to enter judgment for that sum plus the amount for which judgment has already been rendered.

ARCHIBALD KING,
Attorney for Appellant.

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IN THE

Supreme Court of the United States.

October Term, 1912.

SARAH K. MCLEAN, widow of NATHANIEL H. MCLEAN, *Appellant*, v. THE UNITED STATES. } No. 33.

BRIEF IN REPLY FOR APPELLANT.

The several arguments made by learned counsel for appellees in opposition to this claim will be considered in order.

Propriety of Reference to Congressional Reports.

The brief for appellees opens (p. 3) with an objection to our referring to Congressional reports upon the claim of the appellant. In the case referred to by learned counsel, *Sisseton & Wahpeton Indians* v. *United States*, 208 U. S. 561, 566, this court refused to permit the findings of the Court of Claims to be contradicted by statements in public documents. But this court has repeatedly read into its very opinions the reports of committees of Congress in order to assist it in interpreting legislation based upon those reports, so that it might see what was the mischief to be remedied, the object Congress had in mind, and the circumstances under which it acted. That is the sole purpose for which we have referred to

Congressional reports, that the court might understand the early history of this case, the transactions out of which arose the legislation to be construed. With this object in mind, a reference to Congressional reports is proper. In *Holy Trinity Church* v. *United States*, 143 U. S. 457, *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 333, and *Northern Pacific Co.* v. *Washington*, 222 U. S. 370, 380, this court in its opinion quoted at length from reports of committees of Congress in order to get light upon the proper construction of the statutes before them. For the same purpose the court briefly referred to such reports in *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 40; *The Delaware*, 161 U. S. 459, 472; *Buttfield* v. *Stranahan*, 192 U. S. 470, 495; and *Binns* v. *United States*, 194 U. S. 486, 495.

In *Oceanic Steam Navigation Co.* v. *Stranahan*, *supra*, the court, speaking by Mr. Justice White (now Chief Justice), said (p. ~~33~~ 333):

"While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled, and the same result is reached by a consideration of the report of the Senate Committee on Immigration, where the provisions originated, and which we have a right to consider as a guide to its true interpretation. *The Delaware*, 161 U. S. 459; *Buttfield* v. *Stranahan*, 192 U. S. 470, 495. In that report it was said:"

[Here follows a long quotation from the report.]

In view of the court's own action in quoting from Congressional reports we think we may be permitted to refer to them.

Accounting Officers' Action Not Conclusive.

In the next division of his brief (p. 5) learned counsel for appellees contend that under the act for Mrs. McLean's

relief (quoted, *infra*, p. 4), the determination of the accounting officers of the Treasury is conclusive, and that neither the Court of Claims nor this court may consider the case upon the merits. It is claimed that as the accounting officers have decided that forage and servants' pay are not due claimant, the courts must accept that determination and are powerless to examine its correctness. This defense, it may be noted, was expressly considered and rejected by the court below (record, p. 8).

FUNCTIONS OF THE ACCOUNTING OFFICERS.

Before directly meeting this argument it may be helpful to examine briefly the nature and duties of the accounting officers. The foundation statute upon the subject is R. S. §236, as follows:

"All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

In order to carry out the above direction Congress has by the Dockery act (July 31, 1894, c. 174, 28 Stat. L. 162, 205) established in the Department of the Treasury six auditors, an Auditor for the Treasury Department, an Auditor for the War Department, etc., and as an appellate executive tribunal over them all, a Comptroller of the Treasury. The Dockery act defines the duties of each of these officers. For example, of the Auditor for the War Department it says (p. 206):

"The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and

grounds under the Chief of Engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of War."

The statute upon which the present suit is based is as follows (February 24, 1905, c. 777, 33 Stat. L. 743, 806):

"That the proper accounting officers be, and they are hereby directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July twenty-third, eighteen hundred and sixty-four, to the date of his reinstatement, March third, eighteen hundred and seventy-five, and that the amount found due by said adjustment is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated."

IDENTICAL LANGUAGE USED IN GENERAL STATUTE.

The argument for defendants is that the words "settle and adjust" in the foregoing statute mean that the action of "the proper accounting officers" is final and not subject to judicial review. The answer that at once occurs to any mind familiar with the statutes bearing upon the accounting system of the Government is that the words above quoted, "settle and adjust," are the identical words used in the foundation statute upon which that whole system is based, namely, R. S. §236, which says:

"All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be *settled and adjusted* in the Department of the Treasury." (Italics ours.)

It has never been held that the decisions of the account-

ing officers acting under the statute just quoted, upon all sorts of claims, were conclusive upon the courts. *Thomas* v. *United States*, 16 C. Cls. 522. Why should greater finality be imputed to them when acting under another statute which uses the same words?

It is elementary that when words used in an earlier statute have acquired through judicial interpretation or long custom a certain meaning, the same words used in a later act will be read as having that meaning. *The Abbotsford*, 98 U. S. 440; *Kepner* v. *United States*, 195 U. S. 100, 124. The words "settle and adjust" in the act now to be construed mean the same thing as they mean in R. S. §236, namely, that the proper auditor shall make what is known in departmental language as a "settlement," *i. e.* a debit and credit statement of account. This is exactly what he does when any other claim is presented to him which by R. S. §236, he is directed to "settle and adjust." But the auditors' "settlements" are never considered binding upon the judicial branch in the latter case, and there is no more reason why they should be here.

The language of the Dockery act defining the powers of the Auditor for the War Department (quoted, *ante*, p. 3) is not substantially different from that in the opening sentence of the act under discussion, yet no one has ever supposed that that prevented the Court of Claims from taking jurisdiction of all claims arising under the War Department. The similarity of language between the act now before the court and those defining the functions of the several auditors, and referring different classes of claims to each, indicates clearly that the accounting officers were to have exactly the same sort of jurisdiction over this as over any other sort of claim—a jurisdiction subordinate to that of the courts.

It is an elementary principle of statutory construction

that a statute is to be read in the light of others *in pari materia*. Congress has by a number of laws, the principal of which are the Dockery act, July 31, 1894, c. 174, 28 Stat. L. 162, 205; the Tucker act, March 3, 1887, c. 359, 24 Stat. L. 505; and the Judicial Code, March 3, 1911, c. 231, 36 Stat. L. 1087, established two sets of tribunals for the consideration of all sorts of claims against the United States. The first are the accounting officers, consisting of one comptroller and six auditors, who are administrative, and not judicial, officers. The other set are the Court of Claims and the District Courts having concurrent jurisdiction therewith. In general, Congress has provided that the acts of the accounting officers shall not be final, but has left the courts open to any claimant dissatisfied with their rulings. Why should we impute to Congress an intention to make an exception of the present claim? No reason can be suggested why the accounting officers' decisions should be given a greater finality in this than in other cases. There is no reason to suppose that Congress intended to alter, with respect to this claim alone, the whole system established by it for the consideration of claims against the United States. The present statute should be read in the light of the others; and unless the contrary very clearly appears, it should be presumed that Congress meant the accounting officers to take jurisdiction of this claim with the same limitations to their power as generally prevail. This presumption is greatly strengthened by the circumstance that Congress used exactly the same language as to this claim as is used in a general statute with respect to the consideration of claims at the Treasury.

Decisions of this Court.

The question now presented is not new. On numerous occasions in the past Congress has in express terms

empowered the accounting officers or some other executive officials to "settle and adjust," to "ascertain," or to "determine," certain claims or certain classes of claims, and it has always been held that the jurisdiction thereby conferred was not exclusive, but that suit might be brought in the Court of Claims. The fact that the executive officers and they alone were mentioned in the acts has not been deemed to deprive the courts of jurisdiction. In *Reed* v. *United States*, 11 Wall. 591, and *Shaw* v. *United States*, 93 U. S. 235, this court had before it cases of this character. They were both claims for the value of steamboats lost while chartered to the United States. The act of March 3, 1849, c. 129, 9 Stat. L. 414, 415, provided in § 2 that the owner should be paid in such cases, and then continued as follows:

"SEC. 3. *And be it further enacted*, That the claims provided for under this act shall be adjusted by the Third Auditor, under such rules as shall be prescribed by the Secretary of War, under the direction or with the assent of the President of the United States, as well in regard to the receipt of applications of claimants as the species and degree of evidence, the manner in which such evidence shall be taken and authenticated, which rules shall be such as in the opinion of the President shall be best calculated to obtain the object of this act, paying a due regard as well to the claims of individuals' justice as to the interest of the United States; which rules and regulations shall be published for four weeks in such newspapers, in which the laws of the United States are published, as the Secretary of War shall direct.

"SEC. 4. *And be it further enacted*, That *in* all adjudications of said Auditor upon the claims above mentioned, whether such judgments be in favor of or adverse to the claim, shall be entered in a book provided by him for that purpose, and under his direction; and when such judgments shall be in favor of such claim, the claimant or his legal representative shall be entitled to the amount

thereof upon the production of a copy thereof, certified by said Auditor, at the Treasury of the United States."

In the above act we have the creation of a special jurisdiction in the accounting officers, who are authorized to make rules of evidence, whose decisions are called "adjudications." Yet the Court of Claims and the Supreme Court held that they had the power to re-examine the cases notwithstanding the "adjudications" of the Third Auditor.

The case of *Smithmeyer* v. *United States*, 147 U. S. 342, alone is decisive of the point involved. Claimant was an architect who had worked for many years on plans for the Library of Congress for which he claimed compensation. There the statute provided (October 2, 1888, c. 1069, 25 Stat. L. 505, 523):

"All loss or damage occasioned thereby, or arising under said contracts, together with the value of the plan for a Library Building submitted to the Joint Select Committee on Additional Accommodations for the Library of Congress by John L. Smithmeyer, in the Italian Renaissance style of architecture may be adjusted and determined by the Secretary of the Interior, to be paid out of the sums heretofore or hereby appropriated."

That act, as the present, created a certain officer a special tribunal to decide the claim in question, and appropriated the money to pay his findings. But this Court did not consider the jurisdiction of the Court of Claims thereby ousted.

Said the court (p. 357):

"The act of October 2, 1888, did not repeal, either expressly or by implication, the general jurisdictional act of the Court of Claims, to the extent of this case. The purport of the act of 1888 seems to have been to provide a method of adjusting the claim, if the claimants so desired, without a suit. The claimants had a right to

the additional method, but they could also waive its benefit. The general jurisdiction of the Court of Claims and the additional method of adjustment can both of them well stand together."

United States v. *Harmon*, 147 U. S. 268, was a suit originally brought in the Circuit Court under the concurrent jurisdiction with the Court of Claims granted by the Tucker Act, by a United States marshal for fees. Certain items claimed had previously been disallowed by the First Comptroller. It was urged that the Circuit Court was prevented from taking jurisdiction by the proviso to § 1 of the Tucker Act (March 3, 1887, c. 359, 24 Stat L. 505):

"*Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims * * * which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same."

The foregoing proviso furnished far stronger ground than anything in the present statute for denying the jurisdiction of the court, yet this court held that it did not make the accounting officers' determinations conclusive, but left them in accordance with the general policy of Congress subject to the revisory powers of the courts.

See also *Wisconsin Central Railroad Company* v. *United States*, 164 U. S. 190, where the court said (p. 205):

"The Postmaster General in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, does not act judicially, and whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment

can not be regarded as a conclusive determination when brought in question in a court of justice."

The case of *Medbury* v. *United States*, 173 U. S. 492, is now the leading case upon the point at issue and is alone decisive as to the construction of the statute now under consideration. In that case the act of Congress before the court read as follows (June 16, 1880, c. 244, 21 Stat. L. 287):

"In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be cancelled for conflict, or where, from any cause, the entry has been erroneously allowed, and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly cancelled by the Commissioner of the General Land Office, and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

The next section appropriated such money as might be necessary for the Secretary of the Interior to make the payments authorized. There, as in the present case, there was an express grant of jurisdiction to a certain officer, and to no one else, and an appropriation to pay what that officer might find due, yet this court held that the Court of Claims might nevertheless take jurisdiction. The court there said (p. 497):

"Although the right to recover back the excess of pay-

ment in this proceeding is based upon the statute of 1880, we do not think it comes within the principle of those cases which hold that where a liability and a remedy are created by the same statute, the remedy thus provided is special and exclusive. In this case it is not a right and a remedy created by the same statute. The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its provisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and you look in vain for any in the act itself. We can not suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right.

"If there were any disputed questions of fact before the Secretary his decision in regard to those matters would probably be conclusive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the

decision of the Secretary refusing to make the payment is not final, and the Court of Claims has jurisdiction of such a case."

With but a few verbal changes, the above language is directly applicable to the case at bar. If we substitute "accounting officers" for "Secretary of the Interior" and make one or two other like changes it might have been written about the present case.

To the same effect as the preceding cases see *United States* v. *Jordan*, 113 U. S. 418, affirming 19 C. Cls. 120, and *United States* v. *American Tobacco Company*, 166 U. S. 468, affirming 32 C. Cls. 207. In these two cases the question of jurisdiction is more fully discussed in the opinions of the Court of Claims than in those of the Supreme Court.

The case of *Parish* v. *MacVeagh*, 214 U. S. 124, cited by counsel for appellees (brief, p. 8), far from being an authority against appellant, is strongly in her favor. The statute construed in that case was as follows (32 Stat. L. 1612, c. 559, February 17, 1903):

"*Be it enacted*," *etc.*, * * * "that the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balances alleged to be due him by virtue of a contract made by Joseph W. Parish & Co., with Henry Johnson, medical storekeeper, acting on behalf of the United States * * * That the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish & Co., if the said contract had been carried out in full without change or default made by either of the parties thereto, under the ruling of the measure of damages laid down by the Supreme Court of the United States in the case of *United States* v. *Behan*, 110 U. S. 338, and in accordance with the evidence in the case collected by the United States Court of Claims and for determining the full

amount thus due, * * * under the said contract and rule of law aforesaid, to deduct therefrom all payments * * * stating what balance, if any, is due under the ruling and evidence presented herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balances is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated."

There is quite as much ground for contending in the present case as there was in that, that the statute makes a particular officer a special tribunal with exclusive jurisdiction. There the act names the Secretary of the Treasury and him alone, just as here no one is named but the accounting officers. But when the Secretary refused to allow anything, this court would not accept that determination as conclusive and compelled him by *mandamus* to issue his warrant.

Vigo's Case, 21 Wall. 648, is also in point. There Congress passed an act which, like the present, referred to one particular claim only, as follows (June 8, 1872, c. 406, 17 Stat. L. 687):

"*Be it enacted*, etc., That the claim of the heirs and legal representatives of Colonel Francis Vigo, deceased, late of Terre Haute, Indiana, for money and supplies furnished the troops under command of General George Rogers Clark, in the year seventeen hundred and seventy-eight, during the revolutionary war, be, and the same is hereby, referred, along with all the papers and official documents belonging thereto, to the Court of Claims, with full jurisdiction to adjust and settle the same; and, in making such adjustment and settlement, the said court shall be governed by the rules and regulations heretofore adopted by the United States in the settlement of like cases, giving proper consideration to official acts, if any have heretofore been had in connection with this claim, and without regard to the statutes of limitations."

The foregoing act mentions the Court of Claims only and says nothing about an appeal to this court; but this court held that save insofar as otherwise expressed in the act, the Court of Claims took the case with the same powers and subject to the same limitations as in other cases coming before it, and that as in general an appeal lay from that court to this, Congress intended that one should be allowed in that case. So here we contend that when Congress passed the act now before the court (*ante*, p. 4) directing the accounting officers to settle this claim, it meant that they should settle it with the same powers and subject to the same limitations as in other cases, and among these limitations is the right of any claimant dissatisfied with what has been allowed him to sue in the Court of Claims.

Decisions of the Court of Claims.

When we turn from the decisions of this court to those of the Court of Claims we find cases equally in point. Thus in *Huffman* v. *United States*, 17 C. Cls. 55, it was held (paragraph 3 of syllabus):

"Where a statute directs an executive officer to examine a class of claims and report them to Congress, there to await legislative action, the report has not the final character of an award, and no action can be maintained upon it; but where Congress validate a class of claims, appropriate money to satisfy them, and direct the Secretary of the Treasury to examine and pay them, the cause of action is not dependent upon the proceedings of the Secretary, and a suit may be sustained on the original claim."

Congress has in the present case done exactly that, directed the accounting officers to examine and pay this claim and made an appropriation for that purpose.

The statute under construction closes with an appro-

priation of the amount found due. The effect of such an appropriation was stated by the court in *Hukill* v. *United States*, 16 C. Cls. 562, 565, 566, as follows:

"An appropriation by Congress of a given sum of money, for a named purpose, is not a designation of any particular pile of coin or roll of notes to be set aside and held for that purpose, and to be used for no other; but simply a legal authority to apply so much of any money in the Treasury to the indicated object.

"Every appropriation for the payment of a particular demand, or a class of demands, necessarily involves and includes the recognition by Congress of the legality and justice of each demand, and is equivalent to an express mandate to the Treasury officers to pay it. This recognition is not affected by any previous adverse action of Congress; for the last expression by that body supersedes all such previous action.

"When, therefore, Congress made the appropriation in question, it was as if the United States said to this claimant and every other of like kind,—'the legality and justice of paying you for the service you rendered in carrying the mails under your contract with the United States in 1859, 1860, or 1861, are recognized.'

* * * * * * *

"Beyond doubt, the authority to take the money out of the Treasury for such payment under *that* appropriation lapsed at the end of the two years; but the right of the parties to assert and maintain their claims, once recognized and affirmed by Congress, became thenceforth, in virtue of that act, an acknowledged right against the United States, which this court is bound to take cognizance of under its general power 'to hear and determine all claims founded upon any law of Congress.'"

This ruling was affirmed in *Blount* v. *United States*, 21 C. Cls. 274.

In the case of *Soule* v. *United States*, 38 C. Cls. 525, an appropriation was made in this language (June 11, 1896, c. 420, 29 Stat. L. 413, 448):

"Back pay and bounty: For payment of amounts of arrears of pay of two and three year volunteers that may be certified to be due by the accounting officers of the Treasury during the fiscal year eighteen hundred and ninety-seven, three hundred thousand dollars."

It should be observed that the foregoing is not an appropriation of what *is due*, but of what *may be certified to be due by the accounting officers*. Claimant had presented her claim to the accounting officers and a certain sum had been allowed and paid her which she contended was less than she was entitled to. She thereupon brought suit in the Court of Claims for the balance alleged to be still owing to her. Defendants demurred on the ground that the court was without jurisdiction. The court held that it was the intention of Congress that all arrears of pay and bounty should be paid and that it might examine the Auditor's settlement, see whether this had been done and entertain a suit for any unpaid balance, notwithstanding the circumstance that the appropriation was only for what the accounting officers might certify to be due. After an elaborate discussion of the authorities the court said (p. 533):

"Upon this review of the authorities it results, that where an appropriation is made for the payment of particular claims which may be settled by the accounting officers of the Treasury, but no exclusive jurisdiction is given to such officers to determine the right to recover upon the part of a claimant of such fund, the Court of Claims has jurisdiction to hear and determine the legal and equitable rights of any and all persons making claims to any of the appropriation.

"The statute creates the right, and that right may be asserted in this court without reference to what may be done or omitted to be done in the Treasury Department unless the court is deprived of jurisdiction by making that Department the exclusive forum for its settlement.

The appropriation act is a direction to the accounting officers to pay what may be due, but a failure to pay does not deprive the claimant of the right to maintain a suit in this court to recover whatever may be due."

In *Miller* v. *United States*, 34 C. Cls. 335, an act of Congress authorized the Secretary of the Treasury to pay to settlers on land taken for a military reservation the value of their improvements. There, as here, the act was in terms directed solely to particular executive officers. The claim was disallowed by the Treasury Department, but the Court of Claims took jurisdiction, saying (p. 340):

"Whether there was or not any prior liability on the part of the Government, the declaration of Congress constituted a distinct and separate promise creating a liability, and a new liability in case of one preexisting, on which the claim accrued when the new liability matured."

In *Pursell* v. *United States*, 46 C. Cls. 509, the statute under construction, March 3, 1885, c. 335, 23 Stat. L. 350, began thus:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service, under the following circumstances."

The act then stated the conditions under which the United States acknowledged liability and continued:

"And the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated, and shall be in full for such loss or damage: *Provided*, That any claim which shall

be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered."

There the act mentioned the accounting officers and them alone, contained an appropriation to pay the loss *so* ascertained and determined, *i. e.* by them, and contained an express proviso that any claim acted on by them should not thereafter be reopened or considered, making a much stronger case for the exclusive jurisdiction of the accounting officers than here. Purssell's claim was rejected by the accounting officers and he brought suit in the Court of Claims. The court held that the appropriating clause and the prohibition to reopen the case were limitations upon the accounting officers but not upon it, that no special tribunal was created and that the statute created a liability of the United States over which it had jurisdiction.

Other cases where it was unsuccessfully sought to make the decisions of the accounting officers binding upon the Court of Claims are *Bogert* v. *United States*, 3 C. Cls. 18; *Thomas* v. *United States*, 16 C. Cls. 522; *Longwill* v. *United States*, 17 C. Cls. 288; *Webster* v. *United States*, 32 C. Cls. 362; *Hardie* v. *United States*, 39 C. Cls. 250; *Cox* v. *United States*, 41 C. Cls. 86.

A recent case in the Circuit Court of Appeals for the Third Circuit is in point. *United States* v. *Shipley*, 197 Fed. Rep. 265, was a suit for refund of internal revenue tax under section 3 of the act of June 27, 1902, c. 1160, 32 Stat. L. 406. That act provided that "the Secretary of the Treasury be, and he is hereby authorized and directed to refund out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulutions as may be prescribed, so much

of said tax," etc. The court, by Gray, Circuit Judge, said (p. 268):

"In the case before us, the duty imposed upon the Secretary of the Treasury by the Refunding Act is a direct and positive one to refund all taxes collected on certain interests which shall not have become vested prior to a certain date. The duty imposed upon the Secretary is ministerial, and not executive or quasi judicial. Certain persons who paid such taxes as are designated in the act were vested with the right to have them refunded by the government. The act was an act of grace and bounty on the part of the government, while those entitled to it were entitled to it by law, and the Secretary of the Treasury, as custodian of the funds from which such bounty was to be paid, was not empowered by any discretion vested in him by law to refuse the same, or to diminish or impair its value."

Cases Cited by Appellees Inapplicable.

A close examination of the cases cited by learned counsel for appellees in their brief (pp. 6–8) discloses nothing which should lead to a denial of the jurisdiction of the Court of Claims.

Marshall v. *United States*, 21 C. Cls. 307, cited, p. 8, was a Congressional case referred under the Bowman Act (March 3, 1883, c. 116, 22 Stat. L. 485) more than six years after it had accrued, which had once been disallowed by the Secretary of War. The court held that the case was a barred claim, and that therefore it could not entertain it under the Bowman Act reference. The case is no authority whatever with respect to a claim, such as the present, under the general jurisdiction of the court.

United States v. *California & Oregon Land Co.* 148 U. S. 31; *Foley* v. *Harrison*, 15 How. 433, 446; *Steele* v. *Smelting Co.* 106 U. S. 447; *Adams Express Co.* v.

Ohio State Auditor, 165 U. S. 194; *Plummer* v. *United States*, 24 C. Cls. 517, ~~and~~ all cited to the proposition that where a special tribunal is created to decide upon a particular question its determination is conclusive. In no one of the cases, however, is the principle applied to the accounting officers, nor could it be. The accounting officers are created by law to make an administrative examination of claims, and the Court of Claims is created to make a judicial examination of claims. If the principle had any application to the accounting officers whatever, no claim which had once been before them could be brought before that court, yet such cases are tried there daily. There is no more reason why the principle contended for should be deemed to apply to this than to any other claim. It is absurd to contend that the exercise of discretion by the accounting officers may not be questioned in the courts. To correct the arbitrary rulings of those officers is one of the principal reasons for the creation of the Court of Claims and for the appellate jurisdiction of this court over it. The principle contended for, sound enough when properly applied, has no reference whatever to the conclusions of the Comptroller and Auditors when brought before the courts.

In view of the foregoing review of the authorities, it is submitted that it must be regarded as settled law that the reference of a claim to the accounting officers and an appropriation to pay what they may find due do not render their action on the claim conclusive or oust the Court of Claims of jurisdiction, but on the contrary constitute an acknowledgment by Congress of the liability of the United States and a promise to discharge it, upon which acknowledgment and promise suit may be brought under the general jurisdiction of the Court of Claims.

Certificate Unnecessary.

The next defense raised by counsel for appellees is that appellant has not furnished the certificate mentioned in the act of 1816, which act says (April 24, 1816, c. 69, 3 Stat. L. 299):

"That all officers be allowed, for each private servant actually kept in service, not exceeding the number authorized by existing regulations, the pay, rations and clothing of a private soldier, or money in lieu thereof, on a certificate setting forth the name and description of the servant or servants, in the pay account."

The best answer to this argument is that in *Jones* v. *United States*, 4 C. Cls. 197, such a certificate was furnished, but was held unnecessary and of no effect. That case, discussed in appellant's brief, p. 7, was one in which an officer in captivity in a Confederate prison and out of the military service was under a statute to be paid as though in the service. He sued for servants' pay and filed in the Court of Claims the certificate mentioned in the statute. The court said, p. 206:

"The second question is as to the proof necessary to sustain this charge in this court. We have held repeatedly that affidavits and *ex parte* testimony which might be used before congressional committees, or before the executive departments, are not evidence in this court. Here, however, a much nicer question is presented, because the statute designates the evidence on which the allowance shall be made by the paymaster, viz: '*on a certificate*' of the officer setting forth certain facts; and such a certificate, it is claimed, was produced before the paymaster and the special commissioner. But we think this precise question is not before us. When the claimant made this 'certificate on honor,' he was no longer an officer in the service of the United States. He could no longer be punished for the dishonor of a false certificate; nor could his future pay be stopped if it were found that he had wrongfully received this. He stood like any other

citizen having a just claim against the government, and when bringing his action therefor was bound to sustain it by just such evidence as all other suitors are required to give."

Mrs. McLean is not in the military service and could not be punished if she were to make a false certificate, but as the Court of Claims says, she must sustain her suit by "just such evidence as all other suitors are required to give," *i. e.* by testimony under the rules of the court. A certificate is therefore unnecessary and would be of no effect.

To the same effect, in *Frazer* v. *District of Columbia*, 18 C. Cls. 374, 381, the court said:

"The certificates of Slater and Donegan, however proper for the consideration of the accounting officers, are not evidence in a court of law."

But the question may be looked at in a broader way. The same words may be used of the statute now under construction as were used by the court of the statute in the *Parish* case, 214 U. S. 124. There it was said (p. 132):

"It had, we may say at the start of our discussion, its impulse in the belief that injury had been done to Parish, and it was intended to provide a means of redress. Keeping in view this purpose, we may get light by which to interpret the act."

This is also a remedial statute, and must also be construed liberally.

Would the purpose of Congress, to redress the injury done Lieutenant-Colonel McLean, be carried out by denying to his widow, because of her inability to furnish a certificate, the emoluments to which she would otherwise be entitled? To do so would defeat the intent of Congress for a mere matter of form. When passing this act Congress knew Lieutenant-Colonel McLean was dead

and could give no certificate, and it is absurd to suppose that it meant that its bounty should be defeated by a technical requirement found in a statute passed nearly a century before. The act of 1816 contains a requirement which can be fulfilled only by a living officer; in 1902 Congress was legislating with respect to a deceased officer, and any earlier provisions of law impossible to comply with in the case of a deceased officer were of necessity and by every fair implication repealed or waived by Congress. To hold otherwise would sacrifice the spirit to the letter and would permit the generous intention of Congress to be defeated upon the merest pretext.

Emoluments to be Paid as Though in Service.

The next argument made by learned counsel is that because Lieutenant-Colonel McLean was not in the military service during the period in question he can not get the allowances claimed, that they can not be paid to an officer who voluntarily separated himself from the service by resignation. This position would be entirely sound if it were not for the passage of the act of February 24, 1905 (*ante*, p. 4) upon which this claim is based. It is true that Lieutenant-Colonel McLean was not in the service, but that act directs that Mrs. McLean shall be paid as though he had been in the service. The argument therefore fails.

Forage and Servants' Pay are Emoluments.

As the principal question in this case, whether forage and servants' pay are "emoluments" to which appellant is entitled under the act of February 24, 1905, c. 777, 33 Stat. L. 743, 806, has been so fully discussed in the brief for appellant, and as nothing has been brought forward in the brief for appellees which weakens the contentions made; that principal question will not be further taken up in this brief. There is inserted here, however, a

reference to an important authority which unfortunately escaped attention when appellant's original brief was being prepared. *United States* v. *Gilmore*, 8 Wall. 330, was a suit by an army officer for a balance due him of servants' pay, rations, and clothing. The history of these allowances is very instructively set out in the court's opinion. The main point at issue was the proper rate of servants' pay, and the case in that respect is not now relevant; but the court's attention is now called to the case because the court, in speaking through Chief Justice Chase, not once, but again and again expressly calls servants' pay "emoluments." Thus it is said (p. 331):

"At the time of the passage of the last act, the pay of a private was five dollars a month, with rations and clothing of certain money value in addition. The effect of the act was precisely the same as if the money value of the whole had been ascertained, and the amount had been inserted as the allowance or *emolument* to be paid to the officer in addition to his own regular pay.

"There is nothing in the act which expresses any intention on the part of Congress that, whenever the pay of the private should be thereafter increased, the *emolument* of the officer should be proportionably augmented, without further legislation. But this construction was given to the act by the accounting officers, and the *emoluments* of officers were thus indirectly increased from time to time until 1861. Whenever the pay, clothing, and rations of private soldiers were advanced in amount or value, the *emoluments* of officers were increased proportionally, not by legislation to that effect, but by departmental construction." (Italics ours.)

The act upon which this claim is based (*ante*, p. 4) directs the payment to Mrs. McLean of "all back pay and emoluments." This court has expressly called servants' pay an "emolument" and as the conditions upon which it is payable have been fulfilled (see appellants' brief, pp. 9, 10), it should be allowed her. The same reasoning applies to the emolument of forage.

Appellees Can Not Ask Dismissal.

Appellees' brief closes (p. 23) with a request that the court direct the Court of Claims to dismiss the petition for want of jurisdiction. If our argument on the question of the jurisdiction of the Court of Claims and the conclusiveness of the action of the accounting officers (*ante*, p. 2) convinces the court, of course this request will not be complied with; but even if our argument is unsuccessful, appellees' request should not be granted. The United States has not appealed from the judgment of the Court of Claims, although it might have done so (R. S. § 707). The utmost that an appellee can ask is the affirmance of the judgment below; he can not go further and ask that it be modified in his favor.

In *Smithmeyer* v. *United States*, 147 U. S. 342, discussed *ante*, p. 8, it was said (p. 348):

"The claimants complain that, instead of being allowed $210,000, they were allowed only $48,000. The United States has not appealed, but says that if the question of jurisdiction raised in the Court of Claims and appearing on the face of the record, and hereinafter considered, is decided adversely to the United States, it is content that the judgment should be affirmed."

The United States having failed to appeal, could not have done otherwise in that case and can not in this.

Conclusion.

In conclusion it is submitted that none of the arguments urged in appellees' brief against this claim are sound, and that the case should be remanded to the Court of Claims with directions as asked at the close of appellants' original brief (p. 14).

ARCHIBALD KING,
Attorney for Appellant.

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

SARAH K. McLEAN, WIDOW OF NATHANIEL H. McLEAN, appellant,
v.
THE UNITED STATES.
No. 252.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Nathaniel H. McLean, whose widow is the appellant, was a major and assistant adjutant general in the United States Army in 1864 when he resigned, his resignation being accepted July 23, 1864.

On March 3, 1875, the Congress authorized the President to appoint Maj. Nathaniel H. McLean to fill the first vacancy occurring in the lowest grade of the Adjutant General's Department. Said act is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President be,

> and is hereby, authorized to appoint Maj. Nathaniel H. McLean, late of the United States Army, to fill the first vacancy which may occur in the lowest grade of the Adjutant General's Department, or if he shall deem it best, to reinstate and retire him with the rank to which he would have attained in service at the date of the passage of this act. (18 Stats. L., ch. 187, p. 515.)

In accordance with the foregoing statute, Major McLean was made a lieutenant colonel on the retired list, which rank he held until his death in 1884. From the date his resignation was accepted, July 23, 1864, to the date of his reinstatement on March 3, 1875, he received no pay, but by act approved February 24, 1905, his widow, the plaintiff in the present proceeding, was granted relief under the following statute:

> That the proper accounting officers be, and they are hereby directed to settle and adjust to Sarah K. McLean, widow of the late Lieutenant Colonel Nathaniel H. McLean, all back pay and emoluments that would have been due and payable to the said Nathaniel H. McLean as a major from July 23, 1864, to the date of his reinstatement, March 3, 1875, and that the amount found due by said adjustment is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated.
>
> (33 Stats. L., pp. 743, 806.)

Under this statute the "proper accounting officers" did "*settle and adjust*" the claim authorized by said

statute in accordance with the decision of the Comptroller of the Treasury made on the 7th day of March, 1905, by paying to the said Sarah K. McLean the pay, subsistence and longevity rations which would have been due her husband during the period from the date his resignation was accepted, July 23, 1864, to the date of his reinstatement, March 3, 1875, when he was not actually in the service of the United States. In accordance with the decision of the Comptroller of the Treasury, she was not paid for forage or servants' pay and allowances during the period when her husband, Nathaniel H. McLean, was not in the service.

The questions here for determination are, *first*, as to the jurisdiction of the court to entertain the subject matter of this controversy; and, *second*, if the court takes jurisdiction, is the appellant entitled to commutation for forage and servants' pay and allowances during the period when her husband, Nathaniel H. McLean, was not in the service of the United States?

ARGUMENT.

The second paragraph (p. 1) and the second paragraph (p. 2) of the brief filed herein in behalf of the appellant contains statements not found in the record in this case. In the second paragraph on page 2 it is stated: "These facts are more fully stated in House Report No. 279, 43rd Congress, 2nd session, a reprint of which is appended to Senate Report No. 126, 53rd Congress, 2nd session." Nowhere in the petition, findings of fact, or in the opinion of the court below are any of the facts found which are

stated in these two paragraphs; neither is there any reference whatever made to such facts nor to the reports mentioned in the second paragraph of page 2.

This court has repeatedly held that it will not go behind the findings of fact as made by the Court of Claims and will not consider the evidence upon which they were founded. (5 Wall., 419; 17 Wall., XVII; 93 U. S., 605; 111 U. S., 609; 116 U. S., 154.)

In the case of the *Sisseton and Wahpeton Indians* v. *The United States* (208 U. S., 561, 566) the attorneys for the Indians attempted to use certain public documents which had been submitted to the Court of Claims and which that court refused to incorporate in the findings. This court, through Mr. Justice Holmes, said:

> We may add here that, as we do not go behind the findings of fact (*McClure* v. *United States*, 116 U. S., 145; *District of Columbia* v. *Barnes*, 197 U. S., 146, 150), there has been some waste of energy in arguing from public documents of which we are asked to take notice.

In the case of the *Sac and Fox Indians* v. *The United States* (220 U. S., 481) it was also held that "this court follows the rule not to go behind the findings of the Court of Claims," and that case was distinguished from the case of the *United States* v. *Old Settlers* (148 U. S., 427).

ACT OF FEBRUARY 24, 1905, SUPRA, CONSTITUTED THE ACCOUNTING OFFICERS AND NOT THE COURTS THE TRIBUNAL TO SETTLE THE ACCOUNTS.

In order to "*settle and adjust*" the McLean accounts it was necessary for the proper accounting officers to decide certain questions of fact and law. In order to ascertain if there was anything due under said act the accounting officers were required to decide as a question of fact whether or not Nathaniel H. McLean "*actually kept in service*" any servants and, if so, how many. The evidence to be considered by the accounting officers when determining this question of fact was in part necessarily the muster and pay rolls of the Army, setting forth the service of said Nathaniel H. McLean during said period.

Still another question of fact to be determined by the accounting officers was whether or not the said Nathaniel H. McLean *actually kept* (13 Stats. L., 487) any horses during said period *at the place where he was on duty*. (12 Stats. L., 594.)

To decide these two questions of fact it was necessary for the accounting officers to pass upon the weight and competency of evidence. For instance, the Comptroller of the Treasury was required to pass upon the question of the right of Sarah K. McLean under the statute to commutation for forage and servants' pay and allowances; that is, to entitle Sarah K. McLean to this commutation for forage and servants' pay and allowances, she must produce evidence showing that Nathaniel H. McLean had in actual service two horses and actually employed

two servants, and if the evidence showed that he had two horses, a further question must be decided, and that is whether or not the horses were actually kept in the military service of the United States.

The military and pay records of Nathaniel H. McLean on file in the War and Treasury Departments, respectively, do not show that he employed any servants or used any horses during the period he was not in the Government service. Therefore, to establish the fact that he did employ servants and used horses, there must be offered some kind of evidence, and the accounting officers of the Treasury—*a special tribunal created by said statute*—must consider the weight and competency of the evidence offered to establish such fact. If this is true, the finding and conclusion reached by the accounting officers of the Treasury is final and conclusive, and the Court of Claims was without authority to review it.

In the case of the *United States* v. *California and Oregon Land Company* (148 U. S., pp. 31, 43) it was held:

> Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus, in the case of *United States* v. *Arredondo* (6 Pet., 691, 729), this court said: "It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the

> subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, legislative, judicial, or special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

The judgment of a special tribunal is final and conclusive when no provision is made for appeal to any other jurisdiction. (*Foley* v. *Harrison*, 15 How., 433, 446.)

In the case of *Steele* v. *Smelting Co.* (106 U. S., pp. 447–451) a large number of authorities were reviewed and your honorable court reached the conclusion that "the decision of a competent special tribunal is conclusive."

In the case of the *Adams Express Company* v. *Ohio State Auditor* (165 U. S., pp. 194, 229), Mr. Chief Justice Fuller, delivering the opinion of the court, in part, said:

> The general rule is well settled that "whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination

> comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." (*Pittsburgh, Cincinnati, &c., Railway* v. *Backus*, 154 U. S., 434; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S., 1.)

In *Marshall's* case (21 C. Cls., 307), construing the act of February 28, 1867 (14 Stats. L., 417), it was held that—

> Where a statute authorizes the Secretary of War to refund commutation "whenever it shall appear that under the rules and decisions of the War Department governing at the time the said person was entitled to discharge from the obligation to render personal service under the draft," the Secretary is vested with exclusive jurisdiction.

Again, in *Plummer's* case (24 C. Cls., 517), the Court of Claims, construing a clause of the sundry civil appropriation act of August 7, 1862 (22 Stats. L., 303, 335), held that—

> Where a statute intrusts to a public officer the expenditure of money for a designated purpose without restriction, the exercise of his discretion can not be reviewed if he acts within the general scope and authority of the statute.

In the case of *Parish* v. *MacVeagh* (214 U. S., p. 124) it was held:

> If the reference by Congress to the Secretary of the Treasury to ascertain the amount due to a claimant and pay the same requires

> the exercise of discretion the courts can not control his decision (*Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316); but where the statute simply requires him to ascertain the amount, according to certain prescribed rules, the duty is administrative; and, the amount being ascertained according to those rules, the courts can by mandamus compel the Secretary to issue his warrant therefor.

In said case it was further held that—

> Under the act of February 17, 1903 (c. 559, 32 Stat., 1612), directing the Secretary of the Treasury "to determine and ascertain the full amount which should have been paid to Parish if the contract had been carried out in full without change or default by either party" and to issue his warrant therefor, no judicial duty devolved upon the Secretary, nor has the Secretary power to determine what was right or proper but only the administrative duty of ascertaining the amount and paying the same; and, the amount having been ascertained, the claimant is entitled to a writ of mandamus directing the Secretary to issue his warrant therefor.

The Parish contract called for the delivery of 30,000 tons of ice. Parish had delivered and was paid for 12,768 tons, leaving the payment for 17,232 tons in controversy. (*Parish* v. *United States*, 100 U. S., pp. 500–3; and 214 U. S., pp. 124, 132–3.)

The act of February 17, 1903, directed the Secretary of the Treasury to "determine and ascertain the

full amount which should have been paid to Parish if the contract had been carried out in full without change or default by either party." In other words, the Secretary of the Treasury was directed to determine and ascertain from the Parish contract how much was due Parish according to the prices fixed in that contract per ton for the 17,232 tons in quesion, purely an administrative action.

The act of February 24, 1905 (33 Stats. L., pp. 743, 806), did not direct the accounting officers of the Treasury to *determine and ascertain* any fact or any amount shown by any paper or records in the Treasury Department, but to *settle and adjust* to Sarah K. McLean all back pay and emoluments that would have been due and payable to Nathaniel H. McLean as a major from July 23, 1864, to the date of his reinstatement, March 3, 1865, and that the amount found due by said adjustment is hereby appropriated to be paid out of any money in the Treasury not otherwise appropriated. It will be noted that the Parish act simply directed the Secretary to *determine and ascertain* the full amount due under the Parish contract, while the McLean act directed the accounting officers to *settle and adjust*, and further in the McLean act it is provided that after said adjustment, payment shall be made. In other words, under the Parish act the Secretary's action was limited to ascertaining the *full amount due under the Parish* contract, while in the McLean act the accounting officers were directed to settle

and adjust not any particular sum, but to settle and adjust back pay and emoluments, and to settle and adjust the emoluments it was necessary for them to decide from evidence certain questions of fact as to whether or not Nathaniel H. McLean had actually kept horses and servants while in the service. In this way the action of the accounting officers was not limited to an administrative action as the Secretary was in the Parish case.

In the *Parish* case (*supra*, 133) Mr. Justice McKenna delivered the opinion of the court, and in comparing that case with the case of *United States* v. *Behan* (110 U. S., 338), using the language of a committee of Congress, he said:

> In the latter case (Parish) the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *United States* v. *Behan*.

If the McLean act requires only an administrative action on the part of the accounting officers, the requirements of said act have been complied with by them when payment was made to Sarah K. McLean of the pay of a major and personal subsistence for the period from July 23, 1864, the date of the acceptance of Major McLean's resignation, to March 3,

1875, the date of his reinstatement, as shown by the second paragraph of the claimant's petition. (R., 1.)

If the McLean act required discretionary action by the accounting officers of the Treasury to comply with the provisions thereof, then the act made said accounting officers a special tribunal, and their findings and payments made thereunder are conclusive and were not properly reviewable by the Court of Claims.

SERVANTS' PAY AND ALLOWANCES AND FORAGE STATUTES.

During the period that Nathaniel H. McLean was not in the service of the Army and for which forage and servants' pay and allowances are claimed herein, the statutes on this question were as follows:

> That officers of the Army entitled to forage for horses shall not be allowed to commute it, but may draw forage in kind for each horse actually kept by them when and at the place where they are on duty, not exceeding the number authorized by law: *Provided, however*, That when forage in kind can not be furnished by the proper department, then, and in all such cases, officers entitled to forage may commute the same according to existing regulations.
>
> * * * * *
>
> SEC. 2. *And be it further enacted*, That major generals shall be entitled to draw forage in kind for five horses; * * * and majors, for two horses. (12 Stats. L., p. 594, ch. 200.)

An act of Congress approved April 24, 1816, fixed the forage allowance when not drawn in kind as follows:

> SEC. 12. *And be it further enacted*, That when forage is not drawn in kind by officers of the Army entitled thereto, eight dollars per month for each horse, not exceeding the number authorized by existing regulations, shall be allowed in lieu thereof: *Provided*, That neither forage nor money shall be drawn by officers, but for horses actually kept by them in service. (3 Stats. L., p. 299, ch. 70.)

During the period when the said Nathaniel H. McLean was not in the United States service the law granting servants' pay and allowances was as follows:

> SEC. 12. * * * *Provided also*, That none except company officers shall be allowed to take as servants or waiters, soldiers of the Army, and that all officers be allowed, for each private servant actually kept in service, not exceeding the number authorized by existing regulations, the pay, rations, and clothing of a private soldier, or money in lieu thereof, on a certificate setting forth the name and description of the servant or servants, in the pay account. (3 Stats. L., p. 299, ch. 70.)

On this same question of servants' pay and allowances the act of March 3, 1865, provided as follows:

> That the measure of allowance for pay for an officer's servant is the pay of a private soldier as fixed by law at the time; that no noncommissioned officer shall be detailed or employed to act as a servant, nor shall any pri-

> vate soldier be so detailed or employed except with his own consent; that for each soldier employed as a servant by any officer there shall be deducted from the monthly pay of such officer the full monthly pay and allowances of the soldier so employed; and that, including any soldier or soldiers so employed, no officer shall be allowed for any greater number of servants than is now provided by law, nor be allowed for any servant not actually and in fact in his employ. (13 Stats. L., p. 487, ch. 79, sec. 1.)

AN OFFICER RESIGNING IS NOT ENTITLED TO COMMUTATION OF ALLOWANCES.

Finding I made by the Court of Claims is as follows:

> Nathaniel H. McLean, whose widow is the claimant, was, prior to the 23rd day of July, 1864, a major and assistant adjutant general in the United States Army. On that date he was separated from the service by receipt of notice of the acceptance of his resignation. (R., 5.)

A somewhat similar question was considered by your honorable court in the case of *United States* v. *Sweet* (189 U. S., 471), appealed from the Court of Claims, wherein it was held that—

> An officer of Volunteers in the United States Army who tenders his resignation and is honorably discharged is not entitled to travel pay and commutation of subsistence, under Rev. Stat., sec. 1289, as amended by the act of February 27, 1877, ch. 69, 19 Stat., 243,

> from the place of his discharge to where he was mustered in.
>
> This decision is in accord with the settled practice of the War Department and the Treasury, which has been to deny these allowances when the officer or soldier is discharged, at his own request, for his own pleasure or convenience. The weight of a contemporaneous and long-continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt.

The case of *Jones* v. *United States* (4 C. Cls., 197), cited by counsel for appellant on page 7 of his brief on the question of whether or not an officer not actually in the service under the statute was entitled to servants' pay and allowances, should also be used as an authority on the question of whether or not *sufficient and proper proof* had been furnished showing the employment of servants by McLean.

The Jones case was referred to a commissioner and that commissioner made an allowance for $358.20 servants' pay and allowances. At the trial of the case the Court of Claims deducted said amount allowed by the commissioner for servants' pay and allowances and refused to give him judgment for the same. The late Chief Justice Nott delivered the opinion of the court, and on this question said:

> The second question is as to the proof necessary to sustain this charge in this court. We have held repeatedly that affidavits and *ex*

> *parte* testimony which might be used before congressional committees, or before the executive departments, are not evidence in this court. Here, however, a much nicer question is presented, because the statute designates the evidence on which the allowance shall be made by the paymaster, viz: "*on a certificate*" of the officer setting forth certain facts; and such a certificate, it is claimed, was produced before the paymaster and the special commissioner. But we think this precise question is not before us. When the claimant made this "certificate on honor" he was no longer an officer in the service of the United States. He could no longer be punished for the dishonor of a false certificate; nor could his future pay be stopped if it were found that he had wrongfully received this. He stood like any other citizen having a just claim against the Government, and when bringing his action therefor was bound to sustain it by just such evidence as all other suitors are required to give. We must, therefore, strike from the report of the special commissioner these items for servants' pay. (*Jones* v. *United States*, 4 C. Cls., 197, 206.)

McLean, like Jones, was out of the service and with him it was impossible, as it was with Jones, to make *the certificate required* to entitle even McLean, much less his widow, to servants' pay and allowances.

While the Court of Claims in the *Jones* case, *supra*, did hold that private servants for which officers are allowed pay under the act of April 24, 1816 (3 Stats.

L., p. 298, sec. 12), need not be in actual attendance on the officer, the Court of Claims also held that (p. 198):

> An officer who did not violate his duty wilfully **nor intentionally** at the time of his capture, and whose conduct then was an indiscretion and not an offence, and who on his exchange demanded a court of inquiry and was refused, is entitled to his pay and allowances under the *act 30th March*, 1814 (3 Stat. L., 114, sec. 14), notwithstanding that he was dismissed the service by the War Department during his captivity. (Black letter ours.)

The *Jones* case differs from the present case in this, that Jones was captured by the enemy and confined in prison for sixteen months and as soon as exchanged made an effort to return to duty; while in the present case McLean *tendered his resignation* and it was accepted. He therefore must be considered as having **intentionally** placed himself without the service of the United States. In accordance with the decision of this court in *Sweet's* case, *supra*, an officer who tenders his resignation is not entitled to travel pay and commutation of subsistence, and not being entitled to travel pay and commutation of subsistence, an officer certainly would not be entitled to commutation for forage and servants' allowances as claimed in the present case.

The case of *Kilburn* v. *United States* (15 C. Cls., 41, 46) is also cited by counsel for appellant. It will be noted, however, that the *Kilburn* case differs from

the present case the same as did the Jones, that is, that—

> In all the cases referred to the parties to whom back pay has been allowed have been considered by Congress to have been *illegally or unjustly or inadvertently dismissed the service.* In order to remedy the wrong or repair the injustice of such *dismissal*, it has been considered both just and humane that its revocation should be complete, and should relate back to the day of the *order of dismissal*, so as to make the party entitled to full pay, as though no such order had ever been made. (Italics ours.)

In other words, Kilburn and Jones were unjustly or inadvertently dismissed the service, while McLean in the present case *voluntarily* separated himself from the service by resigning, and under the decision of this court in *Sweet's* case, *supra*, he is not entitled to commutation for forage and servants' pay and allowances during the period he was out of the Government service as a result of his own voluntary act.

THE FINDINGS DO NOT SHOW THAT NATHANIEL H. McLEAN HAD SERVANTS AND HORSES ACTUALLY IN THE SERVICE.

The act of July 15, 1870, abolished all emoluments and allowances for forage and servants. (18 Stats. L., p. 320, sec. 24.) The petition in this case seeks an allowance for forage and servants' pay and allowances for the period from the date of the acceptance of his resignation, July 23, 1864, to July 15, 1870, the date of the passage of the act last above mentioned.

Finding 3 states that from July 23, 1864 (date of the acceptance of his resignation), to September 23, 1864, said Nathaniel H. McLean had one servant in his employ, and that from September 23, 1864, to July 14, 1870, inclusive, he had servants in his *private* employ, but how many the evidence does not satisfactorily establish. (R., 5.)

From the date of the acceptance of his resignation, July 23, 1864, to July 14, 1874, said Nathaniel H. McLean was not in the service of the United States and therefore did not and could not have in his employ a servant or servants "*actually kept in service*," as required by the act of April 24, 1816 (3 Stats. L. 299), herein above set out, to entitle him to an allowance for servants' pay and allowances. Said act of April 24, 1816, also provided for the payment of money in lieu of a servant "*on a certificate setting forth the name and description of the servant or servants, in the pay account.*" Nathaniel H. McLean being out of the service, it was impossible for such a certificate to be made, and nowhere do the findings show that there ever was "*a certificate setting forth the name and description of the servant or servants,*" as required by said act. (See Jones case, p. 15, ante.)

Finding 4 states that from *about* September 23, 1864, to *about* July 14, 1870, said Nathaniel H. McLean owned two horses, one of them being used for a saddle horse occasionally, but they were generally used with the *private carriage* of the said

Nathaniel H. McLean for his use and that of his family. (R., 6.)

The law authorizing commutation of forage provided "*that neither forage nor money shall be drawn by officers, but for horses actually kept by them in service.*" (3 Stats. L., 299.) *Actually kept by them in service* did not mean in the *private employ* of Nathaniel H. McLean when not in the service of the United States, but did mean that officers were entitled to commutation of forage for horses *actually kept by them in service;* that is, in service of the United States. A somewhat similar question was before your honorable court in the case of the *United States* v. *Phisterer* (94 U. S., pp. 219, 220), wherein it was held that—

> An officer of the Army who, under the consolidating act of March 3, 1869, is ordered from a military post, at which he is doing duty, to his home to await orders does not exchange his station, within the meaning of sec. 1117 of the Army Regulations.
>
> The home of the officer to which he is ordered is not a military station. A military "station" is merely synonymous with military "post." In each case it means not an ordinary residence, having nothing military about it, except that one of its occupants holds a military commission, but a place where military duty is performed, or stores are kept or distributed, or something connected with war or arms is kept or done.
>
> An officer so ordered is not, when at home awaiting orders, entitled to commutation for quarters and fuel.

The case of the *United States* v. *Lippitt* (100 U. S., pp. 663, 670) affirmed Phisterer's case, and in doing so your honorable court said:

> Nor is there anything in *United States* v. *Phisterer* (94 U. S., 219) in conflict with the conclusion we have reached. We there held that an Army officer at his own home awaiting orders, and having no public duty to perform, was not entitled to commutation for quarters or fuel.

The statutes relative to forage and servants' pay and allowances require that these expenditures shall be made "*in service*," and those statutes certainly mean in Government service and not private service, or for forage for horses actually used by one in Government service and servants actually employed by one in Government service. During this period Nathaniel H. McLean was not in the Government service; therefore he could not have made any expenditure for either forage or servants.

WHAT ARE PAY AND EMOLUMENTS?

In *Sherburne's* case (16 C. Cls., pp. 491, 496), and reaffirmed in *Wilson's* case (44 C. Cls., p. 428), the Court of Claims held that—

> Pay is a fixed and direct amount given by law to persons in the military service in consideration of and as compensation for their personal service. Allowances, as they are now called, or emoluments, as they were formerly termed, are indirect or contingent remuneration, which may or may not be earned and which is sometimes in the nature of com-

> pensation and sometimes in the nature of reimbursement. Both pay and allowances are compensation for services while in service, and the system of making a portion of the compensation contingent was at the time of the passage of the act of 1870 common to all armies. (Scott's Military Dictionary; Art., Allowances.)

The statute enacted for the relief of the said Sarah K. McLean provided for the payment to her by the proper accounting officers of all back pay and *emoluments*. Commutation of forage was one of the emoluments of a major in the service of the United States at that time.

In *Odell's* case (38 C. Cls., 194) that court held that—

> Commutation is a form of reimbursement and is not a part of the compensation of an officer.
>
> Where there was no expense for quarters there can be no commutation for quarters.

Nathaniel H. McLean, being out of the service of the United States, could incur no expense for forage for horses actually used in the service; neither could he incur any expense for servants employed actually in the service when he himself was out of the service. In other words, the commutation for forage and servants' pay and allowances were conditional allowances, conditioned upon officers having horses "*actually kept by them when and at the place where they are on duty*," as required by 12 Stats. L., p. 594; and as to servants, the condition was that allowance would

be made officers for servants "*for each private servant actually kept in service * * * on a certificate setting forth the name and description of the servant or servants.*" None of these conditions were complied with by Nathaniel H. McLean so far as the findings show.

The act of February 24, 1905, *supra*, does not authorize the payment of commutation for forage, servants' pay and allowances, or any other allowances in the nature of reimbursement of expenses incurred.

CONCLUSION.

The Court of Claims rendered judgment in favor of the appellant for $682.75 on the item set out in the fifth paragraph of the petition and the sixth finding of fact. (Rec., pp. 3, 4, 6.) If this court sustains the Government's position to the effect that the Court of Claims had no jurisdiction to entertain and adjudicate the matters here in controversy, then we ask that mandate issue directing the lower court to dismiss the petition for want of jurisdiction.

In the event, however, this court holds that the court below had jurisdiction to entertain and adjudicate this claim, we ask that its judgment be affirmed.

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